COMMERCIAL ASPECT OF UNIFORM STATE LAWS*

AT the close of the American Revolution and even after the adoption of the articles of Confederation, each American State was not only a political unit but an industrial and commercial unit. Means of communication were few and cost of transportation almost prohibitive except in border and coast cities. Each State not only determined its political future but its own industrial and commercial policy. The Constitution of the United States, adopted in 1789, recognized the fact that each State continued as a political unit and at the same time created another political unit, the nation at large. It also recognized in part the Union as one commercial unit and each State as a separate commercial unit. On the limited subjects of foreign commerce, bankruptcy, coinage, patents and copyrights, exclusive jurisdiction was vested in Congress to legislate for the entire nation. On the great and important subject of commerce it divided authority by vesting in Congress power to regulate interstate commerce and left each State to regulate its own commerce. By leaving to each State power to regulate all production and its own commerce, it limited the power of Congress by restricting that body to the regulation of interstate commerce. Therefore, there grew up a separate body of laws in each State of the American Union. An unfortunate (and by many now believed, erroneous) decision by the Supreme Court of the United States in 1869, in the insurance cases, that a contract between citizens of different States did not constitute interstate commerce checked the growth of that unity of law so convenient to the development of industries national in character. While these constitutional provisions tended to localize industry and commerce, the invention of new means of transportation by steam and rail and new methods of communication by telephone and telegraph caused commerce to override State lines and to make that economically national which was legally local. In other words, that which by law is the commerce of each of the forty-five States of the American Union became in fact commerce national in character. It was the failure of our forefathers to foresee that some day the States would become one country for commercial purposes that resulted in vesting in Congress the power to regulate only interstate commerce instead of vesting in that body power to regulate all commerce.

*An address delivered before The Cincinnati Credit Men's Association at The Business Men's Club, Tuesday evening, February 19, 1907, by Francis B. James, of the Cincinnati Bar; President of the Ohio State Board of Uniform State Laws, and Chairman of the Committee on Commercial Law of the Commissioners on Uniform State Laws in National Conference.

For one hundred years, from 1789 when the Constitution was adopted, to 1890, no practical remedy was presented to free commercial intercourse from the inconvenience of a distinct law for each State. There was no central body having power to mold into one law—into one unit—commercial usages and give to them a legal sanction so as to produce one rule for all commercial transactions through the entire country. In 1890 the State of New York suggested a remedy by creating a commission on uniform State laws and inviting the Governor of each State to appoint commissioners to a national conference. The first meeting of the Commissioners on Uniform State Laws was held in 1892, and the year 1906 marked the sixteenth annual conference.

That body had presented to it three questions to solve:

Did commerce suffer from the existing manner of expressing the law merchant?

Would codification afford a remedy?

How could uniformity be brought about?

That commerce did suffer from the present method of expressing the law merchant seems obvious. The law of England was founded on the decisions of her courts except as modified by statutes. The law of each State of the American Union was likewise made up of the decisions and statutes of each State, resulting in as many common laws and statute laws as there were separate commonwealths.

To the merchant there are four essentials to the law: it should be certain, quickly and economically ascertained, and uniform throughout the commercial world.

A person about to acquire a bond, promissory note, draft, certificate of stock, bill of lading or warehouse receipt ought to know with certainty the law governing the transaction. Under the prevailing system, if a case had not been decided in the State where the commercial paper was issued, there was no means of knowing with certainty its legal effect. If the instrument were issued in Ohio and a lawyer consulted, he would say that by the decisions in Massachusetts the transaction is valid; by those of New York it is invalid and he could not tell which view, if either, the courts of Ohio would adopt. Or, if the courts of Ohio had decided that the transfer of the commercial paper was valid and the Supreme Court of the United States had declared it invalid, the lawyer must tell his client that if by chance the transaction should be litigated in the State Courts of Ohio he will win, but if in the United States Court he will lose. If the merchant had taken no legal advice before negotiating for the commercial paper, he might or might not have a remedy, depending

on the accident as to whether the matter was litigated in the State Court or Federal Court.

To this great uncertainty is added infinite delay, but the tradesman of today knows not time nor space and has become accustomed to the shorthand writer, electric car, the limited express, the telegraph and the long distance telephone. His opportunities for trade are gone if he waits days and weeks for a lawyer to go through multitudes of reports, digests, abridgments and encyclopedias and ill-digested statutes. The merchant must have an answer at once, otherwise his opportunity for business is gone.

Law should be furnished economically. The present method of ascertaining the law, is for the lawyer or judge to ascertain a legal principle by induction from the decided cases, which cases he has found by laborious research. Each time a case is litigated, the litigant pays court costs and lawyers' fees and thus the individual bears the expense of giving law to the State when the State should at its own expense furnish law to all the people. It is a great evil that the few individuals are put to the expense of establishing a principle of law for the community, which principle is liable to be overthrown in the next case decided even in the same court. In theory, law is made by the State; in practice, it is made by the litigant, and the cost of law making, instead of being borne by all the people is defrayed by the few. Because the whole country is a unit for commercial purposes, and there are forty-five units for political purposes, it is a great hardship that a merchant about to deal with a piece of commercial paper must take great chances or go to the expense and suffer the delay of finding out with any degree of certainty the laws of the State where the paper is issued. For commercial purposes there should be one rule clearly expressed governing all commercial transactions. Considering the limited power vested in Congress and the powers reserved to the States, a national commercial code is impossible, no matter how desirable. Although Congress may regulate interstate commerce, this power is so limited in its nature that the national law would cover but a limited number of commercial transactions.

Will codification afford the remedy? Codification consists of reducing the whole body of law, or the whole body of law upon a particular subject, into a definite and comprehensive statement. The stock argument against codification is that it makes the law too rigid and may sometimes work injustice in hard, exceptional cases. This argument, however, is fallacious, because every practitioner knows that when hard cases arise the law books are ransacked from the

time of the Norman Conquest and the court blindly applies any obsolete precedent that may have been found by diligent counsel.

The greatest merit of codification is that it produces a higher degree of certainty than the present manner of stating the law. It reduces the entire law upon a particular subject to a set of definite rules, thus furnishing in advance the principle to be followed in cases thereafter arising, and prevents litigation. As was well said by JUDGE CHALMERS, of London, England, in an address delivered before the American Bar Association, August 27, 1902, "The object of the man of business is not to get a scientific decision—but to avoid litigation."

Mr. R. FLOYD CLARKE, of the New York Bar, in the most learned and elaborate argument yet brought out against codification, concedes that the commercial law ought to be codified.

Sir FREDERICK POLLOCK well said: "It (codification) ought at any rate to make the substance and reason of law more comprehensive to men of business who are not lawyers. It is not to be supposed that difficult cases can be abolished or to any great extent made less difficult by * * * any * * * codifying measure. But since difficult cases are, after all, the minority, perhaps it is of some importance to men of business to be enabled to see for themselves the principles applicable to easy ones. * * * Codes are not meant to dispense with lawyers being learned, but for the ease of the lay people and the greater usefulness of the law."

The question is not one of entirely avoiding evils, but to reduce them to a minimum. Laws are just as necessary as convenient guides to conduct in carrying on the business of the world as rules are necessary in conducting any large private enterprise. Whatever may be said of the advantages or disadvantages of the present manner of stating the law or the good or bad resulting from codification of the law, the absolute necessity for uniformity of commercial law in the United States is apparent. Uniformity of law cannot be brought about under the Constitution of the United States by an act of Congress because of the limited powers of that body as construed by the Supreme Court of the United States. The only practical remedy is to prepare a code which shall be declaratory of the law as presented in the best reasoned precedents and in the accepted customs of the commercial world. Let such a code be prepared on each branch of the commercial law and let such codes be passed in the same form by the Legislature of each State. Thus can uniformity in the laws of the various States be brought about without amending the Constitution of the United States or changing the political relations of one State to another or offending the sensibilities of the

most radical advocates of State's rights or of the strictest constructionist of the Federal Constitution. Every business man will at a glance see the benefit of codification of law, because by this means alone, can uniformity be brought about.

How can uniformity be brought about? In the first place a person called upon to prepare a code should make it declaratory rather than amendatory of the law. Where, however, the decisions of the courts and the existing rules of statutory law are manifestly wrong, where they have been outgrown by new mercantile customs and usages, where the economic principles upon which such decisions and statutes were originally based have disappeared, where new industrial, commercial, economic and social conditions have arisen, conservative amendments should be proposed, but no extreme radical reforms advocated. A code should be confined to a statement of the general principles of the law with the well defined exception. Although it should be expressed briefly, yet it should cover those transactions which experience has demonstrated most frequently arise in practice. It should end with a clause stating that cases not covered by the code should be governed by the principles of law and equity, including the law merchant and the commercially accepted customs of merchants. All the continental nations and Turkey and Japan have codified their commercial law, and the successful codification of branches of the English and American law is no longer an experiment.

In 1878, Mr. W. D. CHALMERS, an English barrister (afterwards Judge Chalmers), published a Digest of the Law of Bills of Exchange, Promissory Notes and Checks, and a few years thereafter read a paper before the English Institute of Bankers, advocating the codification of the law governing these classes of commercial paper. The Associated Chambers of Commerce of England, including the Institute of Bankers, directed him to prepare a code which was introduced in the House of Commons by Sir JOHN LUBBOCK. That body referred it to a select committee with Sir FARRAR HERSCHEL (afterwards LORD CHANCELLOR HERSCHEL) as Chairman. After being favorably reported, it passed the House, was sent to the Lords, and there referred to a committee of which LORD BRAMWELL was Chairman. This committee inserted a few amendments and reported it to the House of Lords, which passed it, and the amendments being agreed to by the House of Commons, the bill received the Royal assent on the eighteenth day of August, 1882. Since that time it has been adopted in more than forty of the English colonies and dependencies, and thus a uniform law of negotiable instruments exist through Great Britain and her principal colonies.

Sir FREDERICK POLLOCK reduced the law of partnership to a code and this was adopted by the English Parliament in 1890. Mr. CHALMERS then reduced the law of sales to a code and this likewise was adopted by the English Parliament in 1893.

While the English Parliament has enacted some other statutes bearing upon other branches of commercial law, it may be said that England has codified but three branches of the law, namely, the law of bills, notes and checks; the law of partnership; and the law of sales. So that for thirteen years England has taken no further steps towards codifying her law merchant.

In 1894 the Commissioners on Uniform State Laws in national conference instructed its committee on commercial law to prepare a codification of the law of bills, notes and checks. This work was committed to Mr. JOHN J. CRAWFORD (a former Cincinnati boy), then a member of the New York Bar. It was printed with copious annotations, sent to each member of the conference, prominent lawyers, law professors and American and English Judges with an invitation for suggestions and criticisms and submitted to the Conference in 1895, discussed section by section, amended and adopted. It received the strong indorsement of the American Bankers' Association and many State Bankers' Associations, including the Ohio State Bankers' Association, and many commercial bodies. It has now been adopted in twenty-eight States, by Congress for the District of Columbia, and by the territory of Arizona. This code was an admirable example of its kind and the best piece of codification of the commercial law in any English speaking nation. It is recognized as superior to the English code on the same subject. Notwithstanding its apparent perfection, it has been subjected to some criticism, some of which was merited. At the same time, it has been a splendid lesson for the future that no proposed code should be adopted until it has been thoroughly discussed and considered by the commercial bodies of the country to determine whether it embodies existing usages and customs of the merchants. It serves as an admonition that in the adoption of all future codes, they should not be indorsed by the commissioners until a reasonable time after their preparation.

The commissioners took no further steps toward the codification of the commercial law until 1902, when they employed Professor SAMUEL WILLISTON, of the Harvard Law School, to codify the law of sales. This code was submitted to the Commissioners in 1903, discussed at that meeting, and action thereon postponed for another year. In the meantime it was distributed throughout the country for criticism and suggestions. It was again discussed at the meetings of 1904 and 1905 and again put off for adoption until the meeting of

1906. It was again discussed at the meeting of 1906 and adopted and recommended to the legislatures of the various States for enactment into law. The general assemblies of about thirty-eight States are now in session and it will be introduced into each of these for consideration.

In 1904 the Commissioners on Uniform State Laws employed Professor SAMUEL WILLISTON and Mr. BARRY MOHUN, of Washington, D. C., to codify the law of warehouse receipts. This was submitted to the commissioners at their meeting in 1905 and very fully discussed and action thereon postponed until 1906. In 1906 the committee on commercial law of that body spent three days in discussing its provisions, and it was then submitted to the full Conference, which spent three full days in its discussion, and by the unanimous vote of all the States represented at the Conference it was recommended to the various States. It likewise will be introduced into the legislatures of about thirty-eight States at their sessions now being held.

In 1902 Professor JAMES BARR AMES, Dean of the Harvard Law School, volunteered his services to codify the law of partnership. He did not submit his draft until the meeting of 1906, and its discussion has been postponed until the meeting of 1907. In 1905 the Commissioners on Uniform State Laws employed Professor Williston to codify the law of bills of lading and this was submitted at the annual session of 1906 and action thereon postponed for another year. It is the intention of the Committee on Commercial Law to hold a session in New York in the spring for the purpose of inviting a general discussion on this most important subject of bills of lading. The American Bankers' Association has prepared a bill on the subject of bills of lading to be issued in interstate commerce transactions. While this bill is an excellent measure, its errors are of omission rather than of commission. It is probable that Congress has power to legislate on the subject of bills of lading used in interstate commerce. Be this as it may, it is still important that there should be uniform State legislation on this most important subject.

At the meeting of 1906 the commissioners employed Professor SAMUEL WILLISTON to codify the law governing certificates of stock, and his report will be submitted at the meeting of 1907.

When the Commissioners add to their codes on bills, notes and checks and on warehouse receipts, codes on bills of lading and certificates of stock, they will have rounded out the whole subject of negotiable documents of title and commercial paper, which are recognized as most important instrumentalities in giving mobility to credit.

Although Congress would have power to legislate on bills of

lading used in interstate commerce, it has absolutely no power to legislate on bills of lading not so used, and has no power to legislate upon the important subjects of bills, notes, checks, warehouse receipts, certificates of stocks, partnerships and sales and the numerous other important subjects which the Conference of Commissioners in time will take up for the purpose of codification.

From time immemorial a conflict has been going on between the technical legal view of many questions and the commercial or economic views thereof. Many courts of many jurisdictions have slavishly adhered to technical rules having their origin in obsolete industrial, commercial, economic and social conditions. Other courts and other judges at other times have believed in overthrowing the obsolete precedents and substituting in their place rules which were a recognition of existing commercial usages and customs, and resting upon present economic, commercial, industrial and social conditions. This conflict finds its place in the recorded decisions of the courts and the engrossed laws of legislative halls.

Foreign drafts at first were the only form of commercial paper recognized by the courts. Domestic bills of exchange then received judicial recognition. So late as 1702, LORD JUSTICE HOLT indignantly declared from the bench that promissory notes were not negotiable and that the merchants of Lombard street were trying to make laws for Westminster Hall. Lombard street did make law for Westminster Hall, because the merchants immediately petitioned the English Parliament, and the English Parliament overthrew the dictum of LORD HOLT.

Bank notes, iron warrants, warehouse receipts and bills of lading, though recognized throughout the commercial world as instruments of credit, were slow in finding judicial recognition. It has been necessary for the merchants to appeal to the legislatures of the various States to give this class of commercial paper any standing, and as fast as the legislative bodies have declared them negotiable the courts have been restricting their negotiable character by straight-jacket decisions built upon commercial conditions which no longer exist.

This same conflict has, at times, appeared to a limited extent, in the debates of the Commissioners on Uniform State Laws at their national conferences, but after argument the commercial, rather than the legal view has been universally adopted. And why not? The merchants gave to the law their customs and usages, and now that our legislative bodies are to give to the merchants codes of mercantile law, these codes should, so far as possible, embody these commercial usages freed from legal jargon and unencumbered by mere legal

rules, except such as are based upon ethical principles underlying all American Jurisprudence and principles of economics underlying sane and sound commerce.

The principles of the law merchant are clearly recognized in the negotiable instrument code governing bills, notes and checks, which declares: "In any case not provided for in this act the rules of the law merchant shall govern."

In the proposed code governing the law of sales it is provided: "In any case not provided for in this act, the rules of law and equity, including the law merchant, * * * shall continue to apply."

In the warehouse receipts act: "In any case not provided for in this act, the rules of law and equity, including the law merchant, * * * shall govern."

The proposed bills of lading code: "In any case not provided for in this act, the rules of the common law, including the law merchant, * * * shall apply." There is no doubt that the next session of the conference of Commissioners on Uniform State Laws, when that body comes to recommend the bills of lading code to the legislatures, will recommend that this section be made to exactly conform to the sales code and the warehouse receipts code. In the first draft of the partnership act, it is stated that: "The rules of equity and common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this act." There is no doubt but that the Conference before recommending the partnership act to the legislatures, will amend this section to conform to the sales act and the warehouse receipts act.

A legal battle has been waged for centuries as to whether the commercial or the legal view of a partnership should be adopted by the courts. Most of the courts have adopted the pure technical legal view, but a few have adopted the commercial view. Professor AMES, in drafting the partnership code, has recognized the commercial view by providing that: "A partnership is a legal person formed by the association of two or more individuals for the purpose of carrying on business with a view to profit."

There has likewise been a conflict between the legal view and commercial view as to what constitutes valuable consideration. The Commissioners on Uniform Laws have accepted the commercial view. In the negotiable instruments act it is expressly provided that, "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value." The sales code provides that, "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of title

are taken either in satisfaction thereof or as security therefor." The warehouse receipts code provides that, "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof, or as security therefor." The proposed bills of lading code provides that, "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where the receipt is taken either in satisfaction thereof, or as security therefor."

The negotiable character of documents of title, including warehouse receipts and bills of lading, is clearly recognized by the sales code, warehouse receipt code and bills of lading code, which declare that when made to order they shall be negotiable. This is the mercantile view.

Thus the Commissioners on Uniform State Laws have formulated codes which, when adopted in the various States, will make the law merchant uniform throughout the United States. The Commissioners have disregarded mere technical quibbles and substituted for obsolete rules of law the existing and living customs and usages of the commercial world. One of the objects of your organization is: "To assist in establishing uniformity in business customs and laws." The Commissioners are carrying out one of the objects for which you were organized because they are embodying within the codes not only rules of law sanctioned by courts which have some conception of the industrial and commercial problems, but also customs and usages of merchants which have not yet found their places in judicial decision.

Credit is one of the mightiest forces of commerce in the distribution of produce both agricultural and manufactured. It has become the great medium of exchange. The economic or commercial view of credit and the legal view are to some extent divergent. They must be brought into closer harmony. While the legal side of credit deals largely with the forms and sanctions of law, these forms and legal sanctions ought to be based on modern economic and commercial conditions rather than former and more or less obsolete economic and commercial conditions. It may be that the subject of credit is capable of codification. While organizations of lawyers have played an important part in framing codes and helping to bring about uniformity of laws, the commercial bodies have been even more important factors in this work. It was the Associated Chambers of Commerce and Institute of Bankers that fathered the movement in England. It was the American Bankers' Association which

exerted a most potent influence in securing the enactment of the negotiable instruments law. It was the American Warehouse-men's Association which contributed $1,500 to the Commissioners on Uniform State Laws to enable that body to carry on its work by employing experts to codify the law of warehouse receipts. It is for the commercial bodies to support the Commissioners on Uniform State Laws in securing the enactment of the codes on sales, warehouse receipts, bills of lading, certificates of stock and partnerships.

If the commercial theory of credit can be brought into closer harmony with the legal view, might it not be wise for the National Credit Men's Association to take up with the Commissioners on Uniform State Laws the question of codifying the law bearing upon credit and thereby bring about uniformity of law throughout the United States on this very important subject?